

Kentucky Division of Enforcement Annual Report Fiscal Year 2008



Energy and Environment Cabinet
Department for Environmental Protection
Division of Enforcement

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Introduction

On July 9, 2004, Governor Fletcher issued Executive Order 2004-731 making significant revisions in the organizational structure of the Environmental and Public Protection Cabinet. Several of the changes involved the Department for Environmental Protection, one of which was the creation of a new Division of Enforcement. The new Division of Enforcement combined the staff and most of the activities previously included in the enforcement branches of the Division for Air Quality, the Division of Waste Management and the Division of Water. The primary purpose of the organization of the Division of Enforcement was to promote a fair, firm and consistent approach to gaining compliance through the resolution of enforcement cases.

The objective of the Division of Enforcement is reflected in its mission statement:

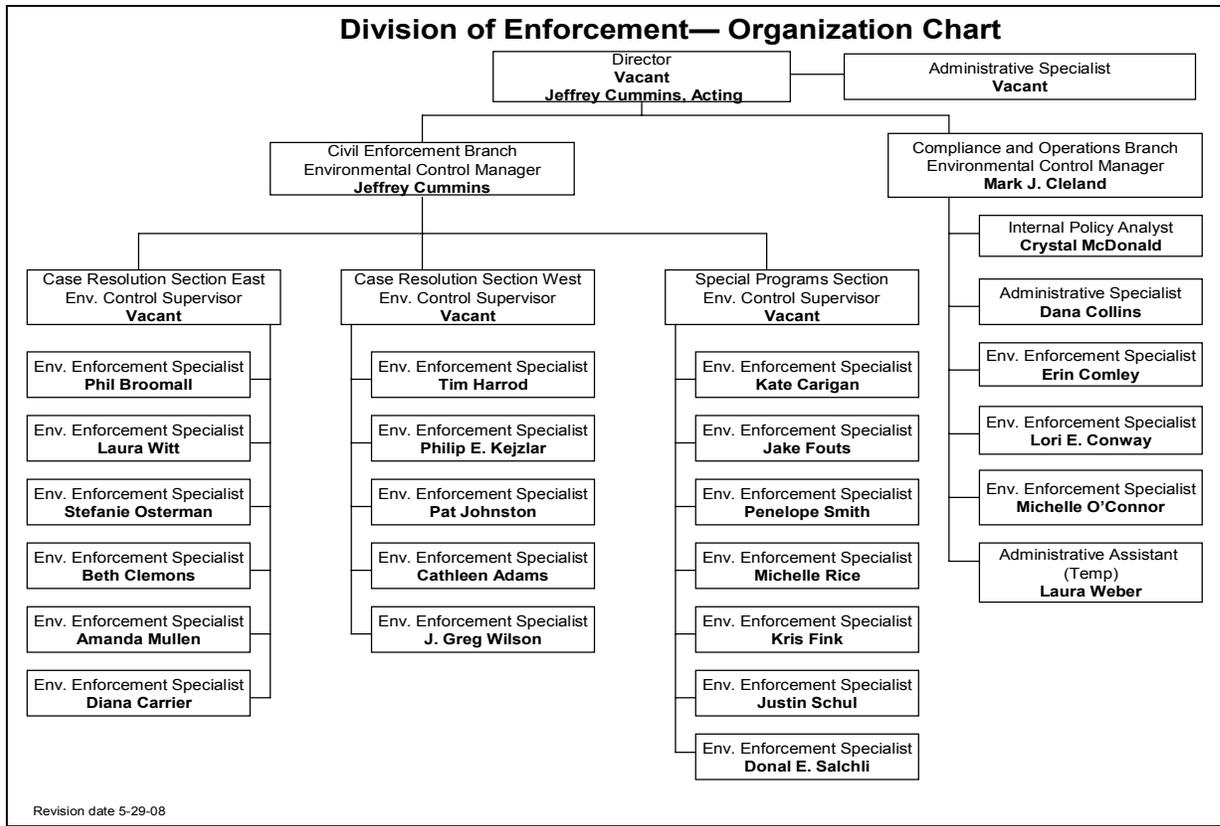
"To use a clear and consistent approach in bringing about and maintaining compliance with the Department for Environmental Protection's air, waste, and water environmental regulatory programs by using appropriate and reasonable measures to resolve cases in a timely manner."

Division Structure

The Division of Enforcement consists of 3 units: the Director's Office, the Civil Enforcement Branch, and the Compliance and Operations Branch. Each of these units performs a distinct function within the Division.

The Director's Office is responsible for the overall management of the Division. This includes setting Division priorities for accomplishing Department goals, coordinating with all of KDEP's divisions, and coordinating with DEP and Cabinet management. The Director's Office consists of a Division Director and an Administrative Specialist.

The Civil Enforcement Branch negotiates civil settlements to resolve environmental violations. There are three sections within the Civil Enforcement Branch: the Case Resolution Section East, the Case Resolution Section West, and the Special Programs Section. Cases for all media (air, waste, water) are assigned to either of the two Case Resolution Sections based on geographical location. The Special Programs Section negotiates cases for specific initiatives, including the open dump initiative and North Fork initiative. In addition, the Special Programs Section manages programs with high volumes of enforcement cases, such as the underground storage tank program. The Civil Enforcement Branch consists of a Branch Manager and eighteen Environmental Enforcement Specialists.



The Compliance and Operations Branch has two distinct functions: regulatory compliance and administrative support. Regulatory compliance involves citing environmental violations discovered by either the Branch or KDEP’s central office programs, and then attempting to return regulated entities to compliance through the implementation of remedial measures. The Compliance and Operations Branch may refer cases to the Civil Enforcement Branch for formal enforcement action. Administrative support includes those functions necessary for the day-to-day operation of the Division: budget, accounts payable, supplies, inventory, vehicle maintenance, training, travel, personnel actions, etc. The Compliance and Operations Branch consists of a Branch Manager, three Environmental Enforcement Specialists, an Administrative Specialist, an Internal Policy Analyst, and a half-time temporary administrative employee.

Staffing

The Division of Enforcement underwent several important changes in its staffing in FY2008. The Division was able to hire nine new Environmental Enforcement Specialists. Eight of these positions were assigned to the Civil Enforcement Branch to facilitate civil settlements for violations cited by the Department. The other position was assigned to the Compliance and Operations Branch to perform compliance activities for the wastewater program and for other DEP central office programs.

In July 2007, Susan Rose Green resigned her position as the Division Director to accept a position as a Hearing Officer for the Cabinet’s Office of Administrative Hearings. Since Ms. Green’s departure, Jeffrey A. Cummins has fulfilled the role of Acting Director for the Division.

CIVIL ENFORCEMENT BRANCH

The Civil Enforcement Branch (CEB) negotiates civil settlements for violations cited by the Department for Environmental Protection. These cases include all media: air, waste, and water. CEB has started emphasizing multi-media negotiations in order to more efficiently and effectively address environmental violations.

Enforcement Process

CEB receives case referrals from the three program divisions (Division for Air Quality, Division of Waste Management, and Division of Water) and from the Division of Enforcement's Compliance and Operations Branch. An enforcement specialist is assigned to the case and proceeds to research the history and nature of the violations, as well as relevant information about the responsible party. The enforcement specialist then develops a resolution strategy and documents that strategy in a case resolution proposal. The case resolution proposal includes corrective actions that are required to return the responsible party to compliance and a proposed civil penalty for the violations.

CEB management reviews the case resolution proposal and recommends any necessary changes. Once management and the enforcement specialist agree on the initial position for resolving a case, the enforcement specialist schedules an administrative conference with the responsible party. This administrative conference is usually held in person at the DENF offices, but may be held telephonically based upon the circumstances of the case.

The administrative conference allows the Department and the responsible party to discuss the facts of the case. The enforcement specialist will determine if any information discussed during the administrative conference changes the basis of the case resolution proposal and will discuss those changes with Division management. The enforcement specialist will then make an initial settlement proposal to the responsible party. Negotiations continue until an agreement-in-principle is reached between the Department and the responsible party or until the determination is made that further negotiation will not result in an agreement.

The enforcement specialist will draft a written document to formalize an agreement-in-principle. Demand letters, which are unilateral orders, are often used when required corrective actions can be completed in relatively short timeframes or when no specific actions are required. Agreed Orders, which are bi-lateral agreements, are used for more complicated agreements. Agreed Orders are signed by the Cabinet Secretary and filed with the Cabinet's Office of Administrative Hearings. Agreed Orders are enforceable in Franklin Circuit Court.

The responsible party and the Department may not reach an agreement-in-principle in some cases. These cases are referred to the Environmental Protection Legal Division (EPLD) and a complaint is filed with the Office of Administrative Hearings (OAH). These cases may be resolved through negotiations with the attorneys at EPLD, or may proceed to a formal hearing. Upon referral of a case to EPLD, the enforcement specialist assumes the role of client contact and assists the attorney as necessary in the development of the case. When a case goes to formal hearing, a hearing officer considers the facts of the case and makes a recommendation for the resolution of the case to the Cabinet Secretary. The Cabinet Secretary can either accept or modify the hearing officer's recommendation. The final resolution is documented in a

Secretary's Order, which is filed with OAH. The Secretary's Order is a final order of the Cabinet and is enforceable in Franklin Circuit Court.

The assigned enforcement specialist is responsible for monitoring compliance with any agreement that resolves a case, whether it is a demand letter, agreed order, or Secretary's Order. Compliance with the agreement results in closure of the case. Failing to comply with the agreement can result in the Cabinet re-commencement of negotiations or with the Cabinet filing a complaint in Franklin Circuit Court.

U.S. EPA may become involved in some cases. The Cabinet may refer a case to EPA for a federal enforcement action. In some cases, the Cabinet may negotiate an enforcement settlement jointly with U.S. EPA. Alternately, U.S. EPA may overfile on an enforcement settlement previously reached between the Cabinet and the responsible party.

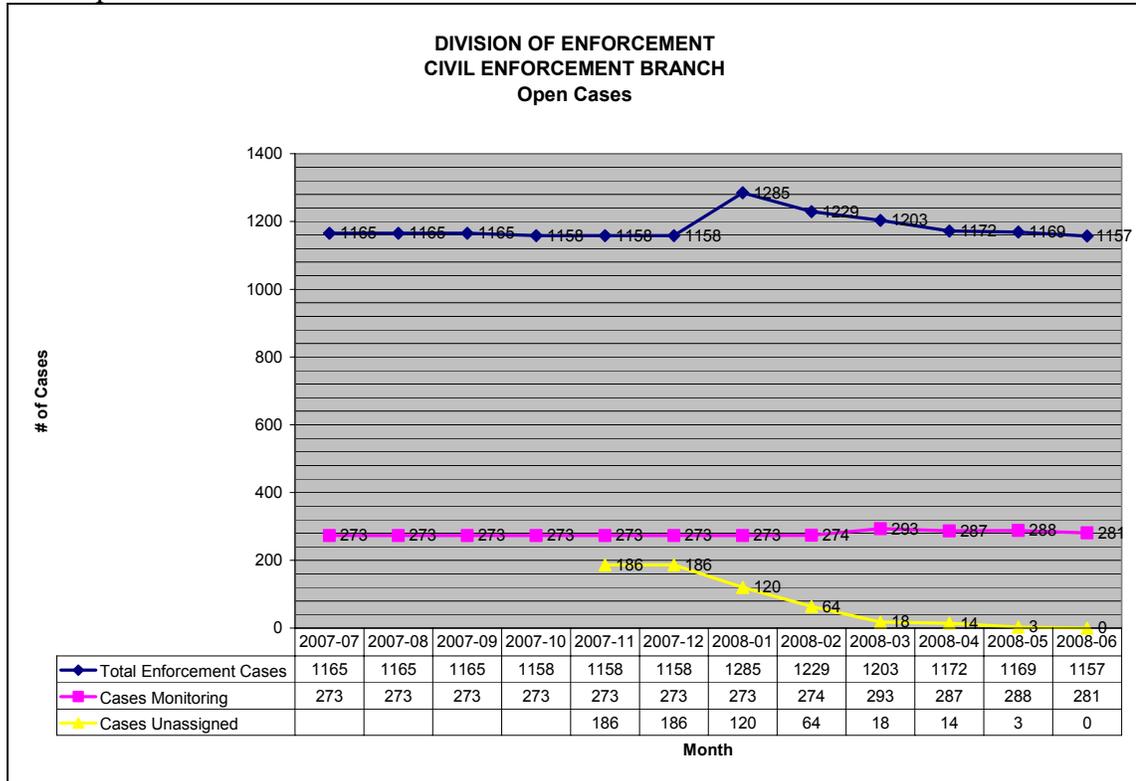
Case Management

The Division of Enforcement tracks the development of cases through the process milestones associated with that case. Major milestones are: 1) Case Assigned; 2) Resolution Processed (CRP Drafted); 3) Agreement-in-Principle Reached; 4) Monitor Executed AO/Doc; 5) Case at EPLD; and, 6) Case at EPA. Due to problems with the extraction of data, the milestone for a small number of cases cannot be determined by reports generated from the Department's database.

During FY 2008, the Division was managing between 1150 and 1285 open cases at any one time. Of these, slightly less than 300 cases were open for monitoring of executed agreements between the Cabinet and the responsible parties. The remaining cases were assigned to be worked by the Division or had been referred to EPLD to begin the administrative hearing process.

Chart 1 summarizes the total case load at the Division of Enforcement during FY 2008. During FY 2008, the Division was able to hire eight additional enforcement specialists to perform case work. The Division was then able to address a group of cases that were inactive due to staff vacancies that the Division had been previously unable to fill. Between November 2007 and June 2008, the Division was able to eliminate the number of unassigned cases at the Division.

Chart 1: Open Cases at the Division of Enforcement.



In the Fall of 2007, the Division made changes to the Department database to enhance tracking of cases within the enforcement process. These changes have allowed the Division to better manage the Division’s case load, better serve the needs of the program divisions, clean-up data base data to improve its accuracy, and increase individual accountability of Division staff.

In FY 2008, the Division was able to improve case management. Chart 2a shows the number of cases under each major milestone in the case process. The Division has shown measurable improvement in moving cases from the “Case Assigned” milestone (case development phase) to the “CRP Drafted” milestone (which commences the negotiation phase). Similar patterns were observed when the cases were broken into media (see Charts 2b, 2c, and 2d).

Chart 2a: # of cases for each milestone by month.

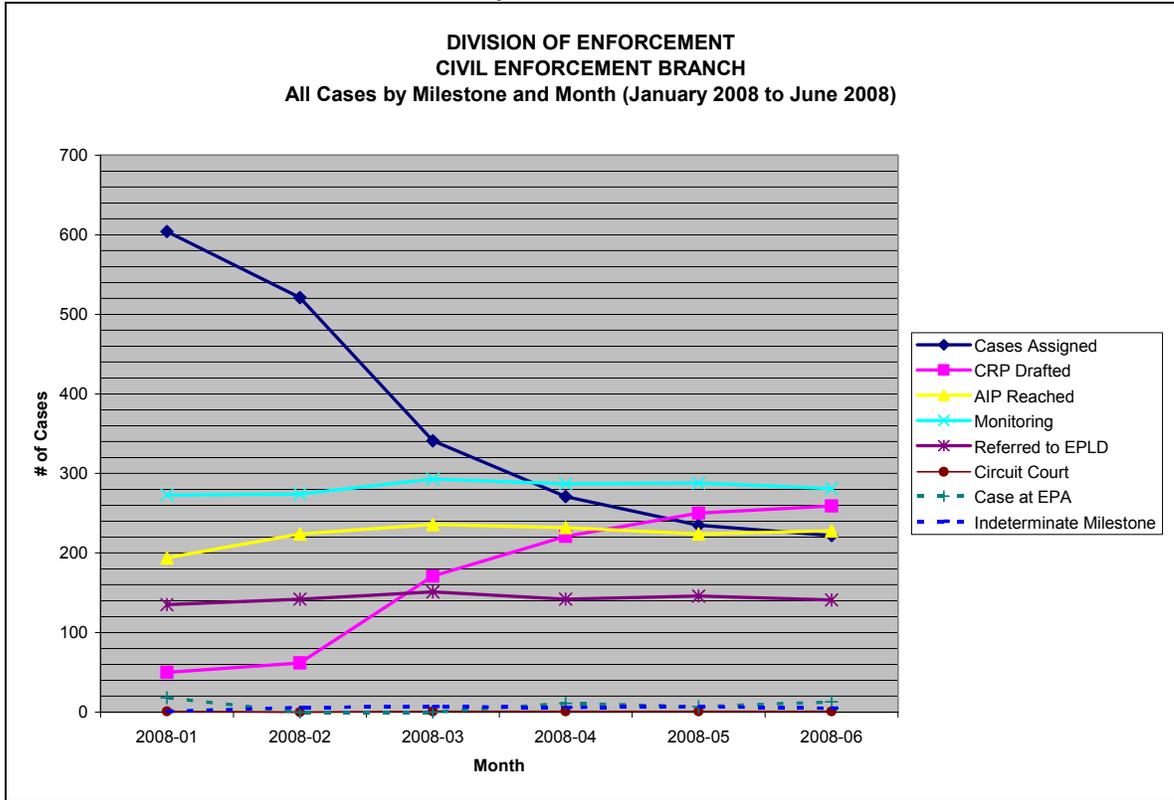


Chart 2b: # of air cases for each milestone by month.

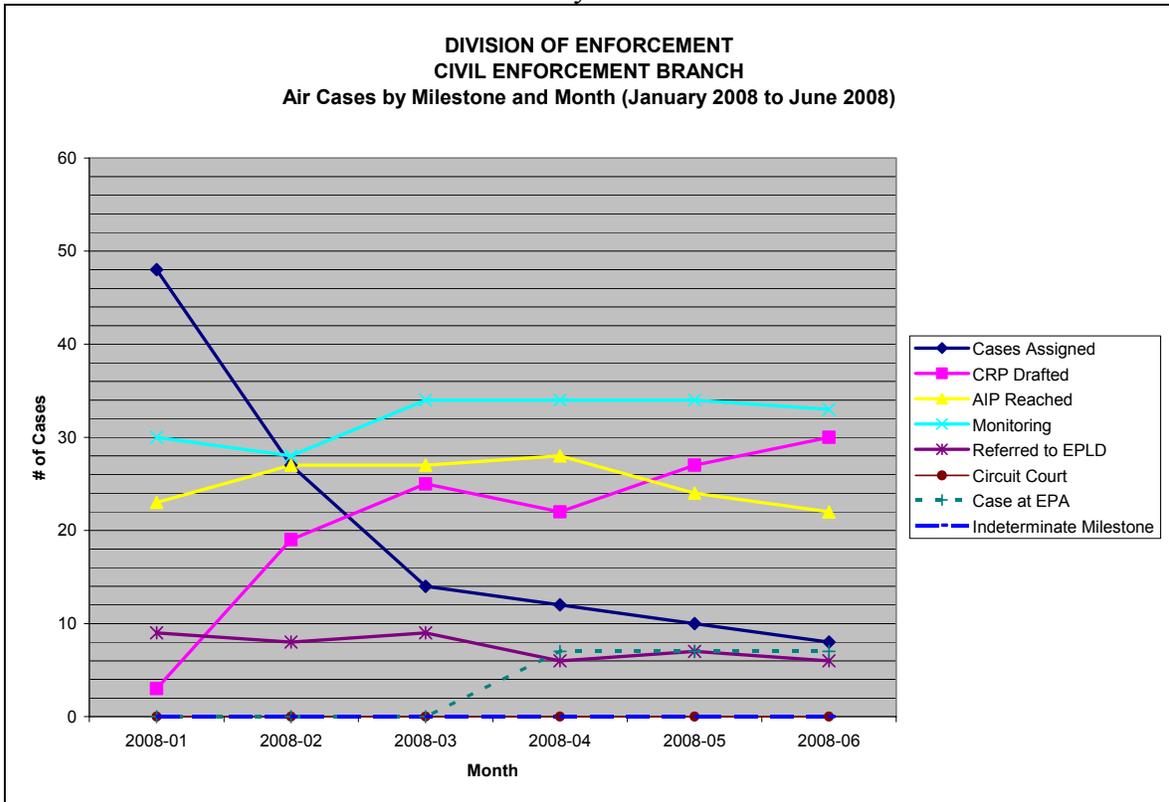


Chart 2a: # of waste cases for each milestone by month.

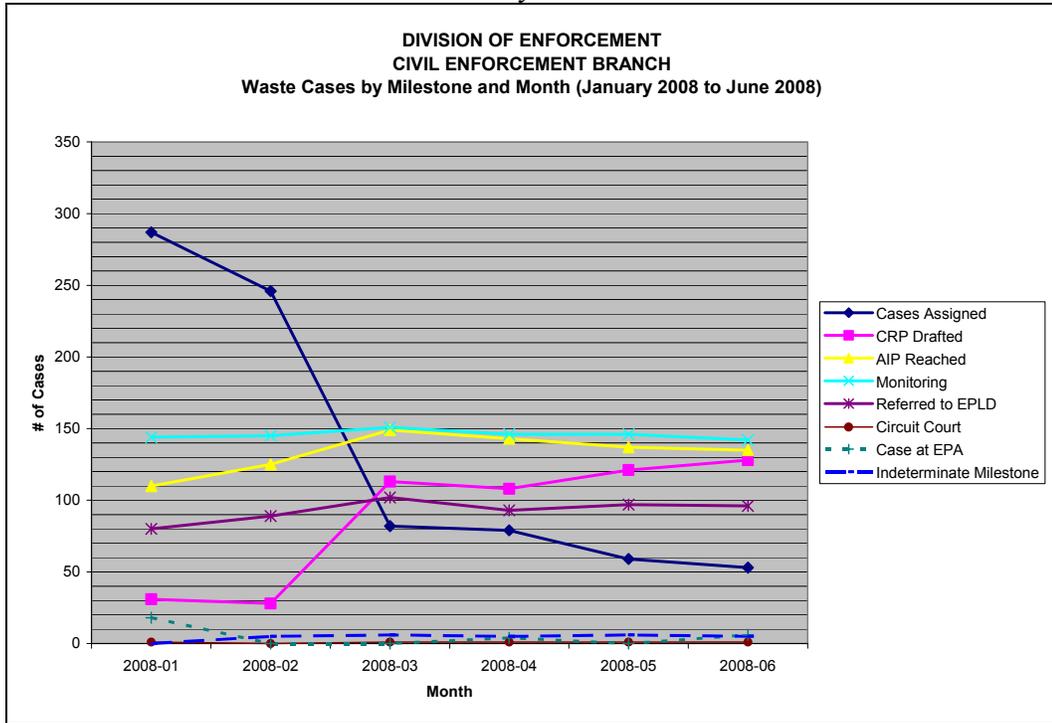
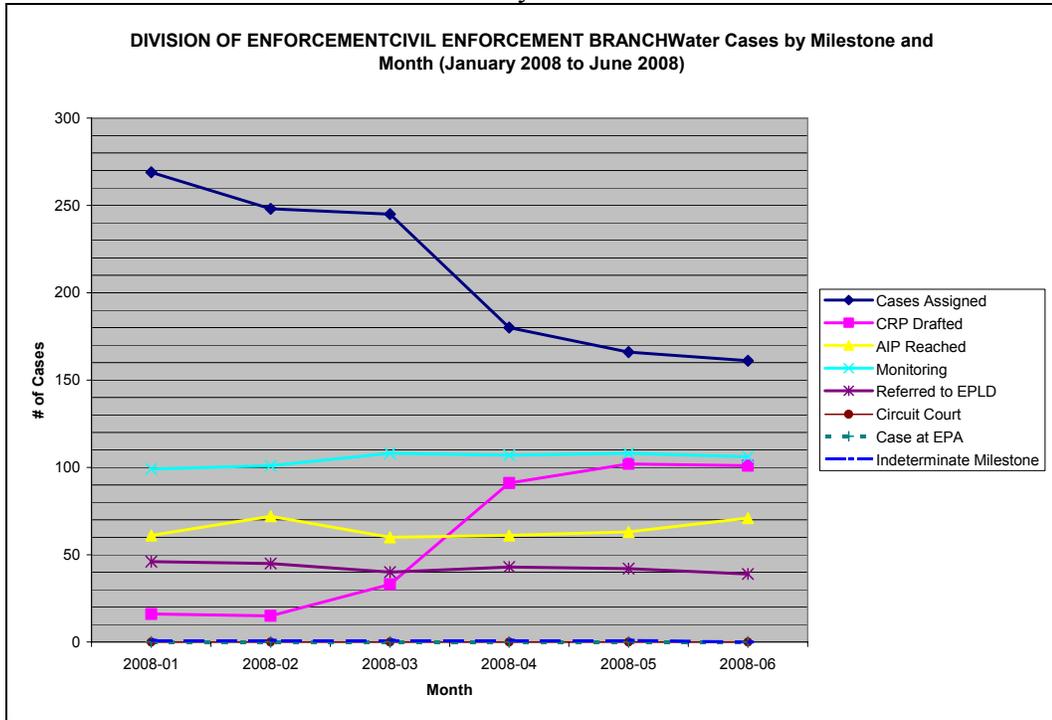
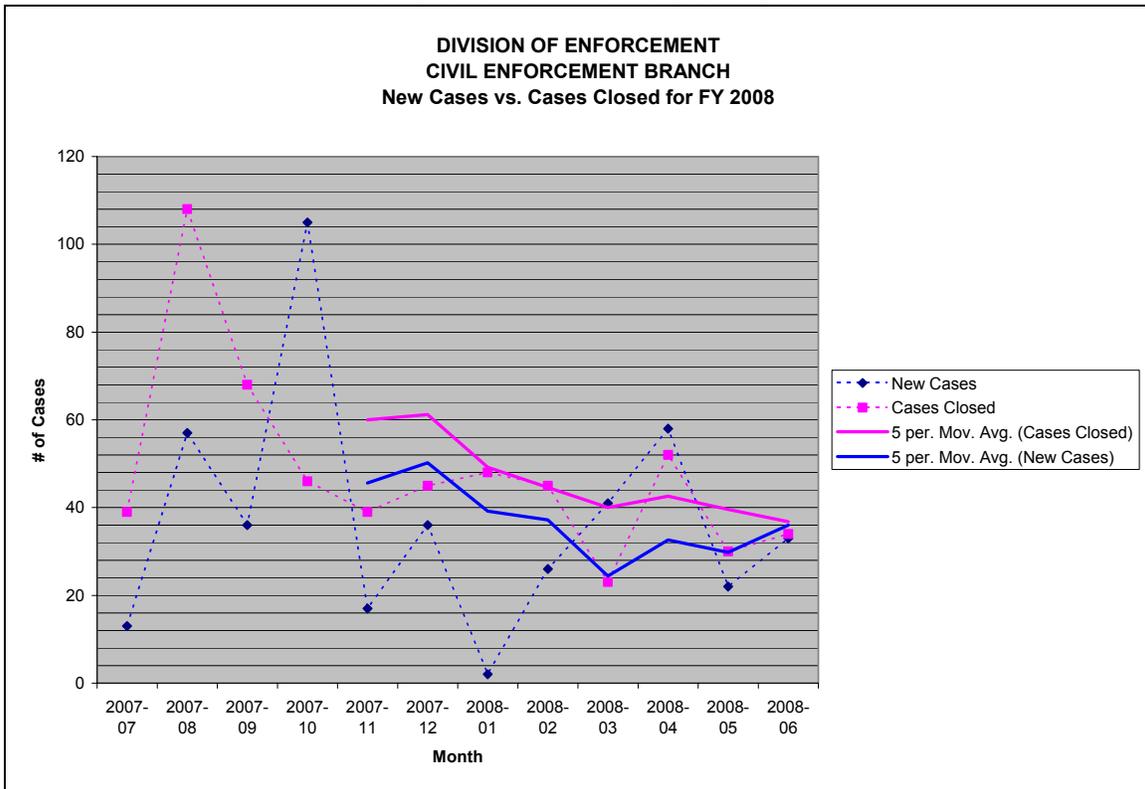


Chart 2d: # of water cases for each milestone by month.



The Division has also been able to make progress on reducing the overall number of cases that are open in the Division. The number of open cases was reduced from 1285 in January 2008 to 1157 in June 2008 (see Chart 1). Chart 3 shows the trend of the Division closing more cases than accepting new cases into the Division.

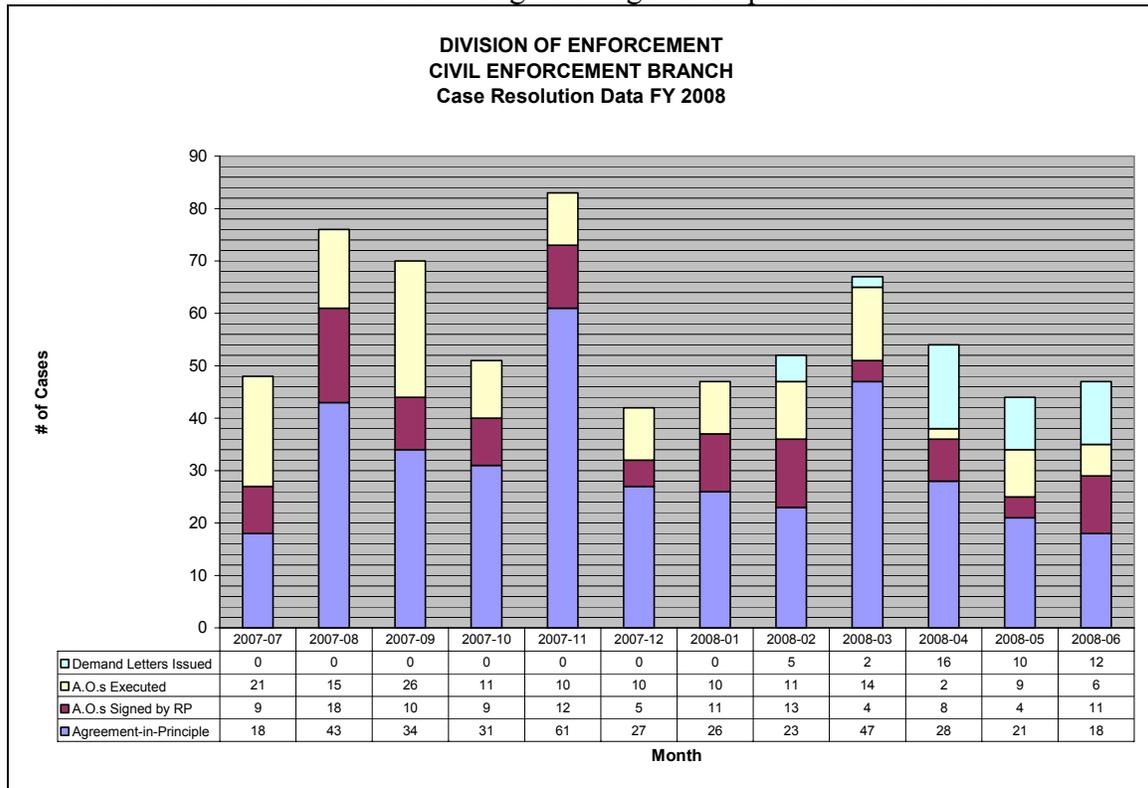
Chart 3: New enforcement cases vs. enforcement cases closed.



The trends for moving cases through the negotiation phase have been less clear. Chart 4 shows an overall increase in the number of cases each month where an agreement-in-principle (AIP) was reached. This is largely attributed to the hiring of eight new enforcement specialists in July and August 2007 to perform case work. The chart does not show that this increase in AIPs has been sustained.

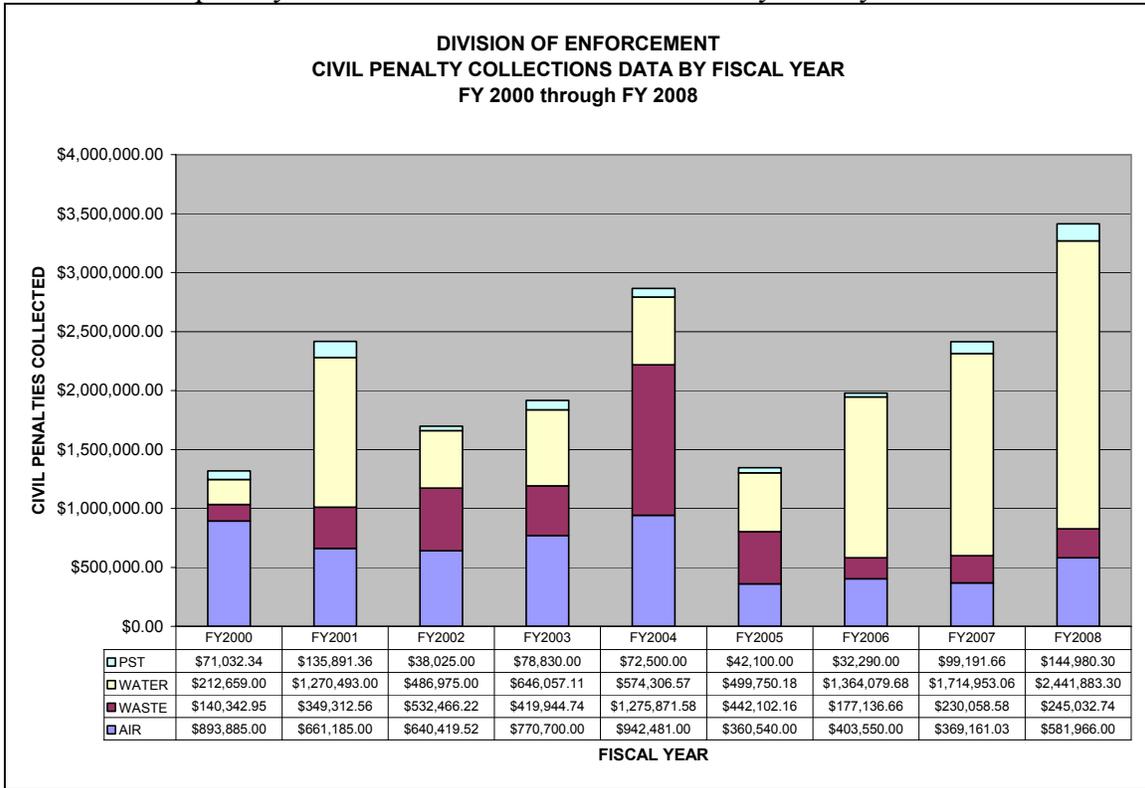
Chart 4 also shows the reintroduction of the use of Demand Letters in February 2008. The use of Demand Letters has not demonstrated a large increase in the number of cases resolved in FY 2008. Further monitoring of the data is required to determine the long-term effects of demand letter use on productivity.

Chart 4: Number of cases moved through the negotiation phase to execution.



The Division had a record-setting year in FY 2008 for the collection of civil penalties resulting from environmental cases. The Division collected \$3,413,862.34 in civil penalties in FY 2008. This is an increase of 41.0% from FY 2007, and an increase of 19.0% over the previous record in FY 2004. A significant portion of the increase in civil penalties collected can be attributed to the resolution of the Rockwell case and the resolution of the cases with the Combined Sewer Overflow and Sanitary Sewer Overflow communities. Chart 5 shows the penalty collection history for FY 2000 through FY 2008.

Chart 5: Civil penalty collection for environmental cases by fiscal year.



The Division plans to continue to refine its case data and its processes. This includes the quantification of performance of individual enforcement specialists, the reorganization of the CEB into three sections, and the hiring of environmental control supervisors for each section. These refinements will further improve the ability to manage and advance cases through the enforcement process.

Significant Cases and Initiatives

The Civil Enforcement Branch has pursued several significant cases and initiatives in FY 2008. Below is a summary of the most significant cases and issues that the Division has addressed.

- **AK Steel Coke Plant** is a by-product coke production facility located in Ashland, KY. EPA and KDEP are pursuing numerous violations at the Coke Plant that include opacity, fugitive emissions, odor, tracking, and permit violations. EPA has drafted a complaint, but it has not been filed to date.
- **Big Run Landfill** is located at 1837 River Cities Drive in Ashland, Boyd County. Big Run accepts municipal solid waste from New Jersey via railcar for disposal at the facility. Big Run has been in enforcement twice since 2005 for violations including fugitive/dust emissions from their haul roads, tracking of mud onto US 60, and odor violations. Big Run remains a contentious issue for the citizens of Ashland. Big Run

was subject to an enforcement action during FY08 and remains in violation of the odor standard.

- The Division of Enforcement has approximately 31 **Bulk Petroleum Corporation (Bulk)** cases that are currently included in an Agreed Order. The Agreed Order was mailed to Bulk Petroleum for signature on August 26, 2008. Bulk had previously entered into an agreed order with the Cabinet. The current enforcement case involves operational and administrative violations at the Bulk facilities. Bulk met with DENF and agreed to complete the remedial measures to bring the sites into compliance and pay a civil penalty of one hundred thousand dollars (\$100,000), payable in twenty-four (24) monthly installments. Bulk additionally agreed to pay the Cabinet a performance penalty in the amount of \$8,000 for each additional Notice of Violation that occurs at any Bulk owned facility.
- **Carmeuse Lime and Stone** owns and operates a limestone mine and manufacturing facility in Butler, KY. Carmeuse has had numerous air violations dating back to 2004. The majority of these violations were for fugitive emissions. Carmeuse and the Cabinet have reached an agreement in principle to resolve the violations. Carmeuse has agreed to enter into an Agreed Order and pay a penalty in the amount of \$70,000. The Agreed Order has been drafted and is currently going through the approval process.
- Seventeen Kentucky communities have **combined sewer overflows (CSOs)** in their wastewater collection systems. Consent Judgments involving fifteen communities were entered in Franklin Circuit Court in August and September 2007. The communities include Ashland, Catlettsburg, Frankfort, Henderson, Harlan, Loyall, Maysville, Morganfield, Owensboro, Paducah/McCracken County, Pikeville, Pineville, Prestonsburg, Vanceburg and Worthington. EPA issued administrative orders to six communities imposing ten-year deadlines for final compliance with the federal CSO control policy. The remaining nine communities were required to submit required documents to EPA for review.
- From 1978 to 1981, **Dunaway Timber** conducted a wood preserving process for mining industry timbers, which involved dipping the timbers in a mixture of pentachlorophenol and diesel fuel. The preservative process was discontinued in 1981, but a spill occurred in 1987 from leftover preservative. An earthen cap was placed over the area of the spill and groundwater monitoring wells were installed in 1992. A post closure permit was issued in 1995. Dunaway failed to obtain financial assurance for the post closure permit area. Financial assurance cases are a national priority for the EPA. As a result, the state initiated an enforcement action against Dunaway. A \$5,000 penalty was paid and an Agreed Order was executed on February 6, 2008.
- **Kentucky State University (KSU)** is a public university in Frankfort, KY. The university has had numerous violations that include opacity, construction and operation without obtaining an air quality permit, and failure to properly operate and maintain air pollution control equipment. KSU has agreed to conduct performance tests on coal-fired boilers #1 and #2 for particulate matter and has agreed to perform a supplemental environmental project. An Agreed Order has been drafted and sent to EPLD for review.

- **KW Metals** is a scrap yard located in Belfry, KY. Air violations primarily consist of fugitive emissions on the local county road. There was also an incident of open burning of 500-700 tires, in addition to other miscellaneous materials. Solid Waste violations consist of petroleum releases to the environment and open dumping. A referral to EPA for PCB contamination may be forthcoming, due to the close proximity of the scrap yard to residences and the potential for contamination of local wells and streams. KW Metals has taken part in an enforcement conference. They have agreed to a schedule to bring the site back into compliance with environmental regulations. Negotiations are ongoing regarding civil penalty.
- **McCreary County Park** involves construction activities for the development of a county park on undeveloped forest land. The site lies within the watersheds of two unnamed tributaries of a listed Outstanding Resource Water. Inadequate erosion control practices have allowed for extensive degradation of the two unnamed tributaries as well as increased suspended, settleable solids, and temperature in the portion of the stream known for Black-sided Dace habitat. The matter has brought involvement from the US COE-Nashville, US FWS, and US EPA, along with DOW and DENF. The case will be settled as a joint EPA-State action against McCreary County and its Park Board.
- **Nally & Hamilton** violated Agreed Orders executed as state-issued water quality certifications (WQC) pursuant to Section 401 of the CWA. Nally & Hamilton is engaged in coal mining. The WQC were allowed for temporary and permanent loss of stream habitat in an outstanding state resource water as part of the construction of a hollow fill for disposal of excess overburden generated from the mining process. The violations occurred when earthen material was deposited within the stream outside of the area authorized by the 401 WQC. The matter has brought involvement from EEC-DNR and US EPA, along with DOW and DENF. The expectation is that the matter will settle through a joint EPA-State action against Nally & Hamilton.
- **Polyair Packaging** manufactures polyethylene foam products in Bardstown, Kentucky. The company had several air violations, but the most significant violation was failing to meet the individual volatile organic compound permit limit for the foam extruder line # 2. This was not only a Title V/Synthetic minor permit violation, but was also a violation of prevention of significant deterioration. This is one of the most serious violations in the Air Quality program. Since this violation occurred, the facility has entered into an Agreed Order with the Cabinet and paid a civil penalty in the amount of \$170,000. The facility has also implemented measures to prevent further occurrences of this type of violation.
- Several years ago EPA initiated a national priority of identifying and pursuing violations of 40 C.F.R. 63 at **Secondary Aluminum facilities**. This regulation went into effect in 2003, and regulates Hydrochloric acid, Dioxin/Furans, and Particulate Matter emissions that result from the process of melting scrap aluminum. Common violations of the regulation found at most of the facilities include, but are not limited to, failing to meet ACGIH flow measurements (helps to ensure adequate capture and collection of all emissions); failing to calculate and record the average baghouse inlet temperature; failing to maintain baghouse inlet temperatures; improper flux usage; failing to have an OM&M plan; and failing to ensure compliance with a number of other record keeping violations. There are currently state-lead enforcement actions against Kentucky Smelting, Topy, and

Ohio Valley. The state is close to having an executed Agreed Order with Topy. EPA and Kentucky are working together and have enforcement actions against Aleris; JL French; Logan Aluminum; Hydro Aluminum; Owls Head; and Southwire.

- **Superior Graphite** manufactures and processes various grades of graphite in Hopkinsville, Kentucky. The facility failed to demonstrate compliance with the limits contained in its Title V/PSD permit for particulate matter. This was a serious violation of the prevention of significant deterioration regulation. However, Superior Graphite did demonstrate that it was likely that the facility was only out of compliance for one day. Superior Graphite has now demonstrated compliance with its Title V/PSD permit. The DENF has recently held an Administrative Conference with Superior Graphite and the facility has agreed to conduct additional performance tests to ensure ongoing compliance. An Agreed Order has been drafted and sent to OLS for review.
- **North American Rockwell** owned and operated a manufacturing facility in Russelville, Logan County from 1957 to 1989. Rockwell was the subject of an enforcement action initiated in 1986 involving remediation of PCB contamination in waters of the Commonwealth. A final agreement was entered between the Cabinet and Rockwell on August 1, 2007 which requires remediation to the standards set in 401 KAR 100:030 and in which Rockwell agreed to pay a civil penalty of \$2,000,000, natural resources damages of \$2,500,000, and to fund supplemental environmental projects totaling \$5,500,000. Included in the SEP was \$2,000,000 to the University of Kentucky for statewide environmental compliance assistance programs to be conducted with Cabinet oversight and \$3,500,000 for water and sewer projects in Logan County.

- A backlog of 666 **unassigned UST cases** was identified at the beginning of FY 2008. The primary causes for the backlog were a significant increase in UST case referrals and insufficient staff within the Division of Enforcement to process the cases. In addressing the backlog, the determination was made that data reporting errors existed in TEMPO. Following cleanup of the data, the actual number of backlogged cases was determined to be 454. The cases were evaluated individually and prioritized. To resolve the backlog, DENF hired four (4) enforcement specialists who are dedicated to the UST program. All UST cases were assigned, resolved or closed requiring no further action. At the conclusion of FY 2008, no UST cases were backlogged or unassigned.

COMPLIANCE AND OPERATIONS BRANCH

The Compliance and Operations Branch (COB) performs a wide variety of functions within the Division. Compliance activities include reviewing Discharge Monitoring Reports (DMRs) for compliance with wastewater permit limits, citing violations observed by the DEP, preparing the Quarterly Non-Compliance Report for U.S. EPA, reporting to U.S. EPA on the Facilities Watch List for the Clean Water Act, and referring violations to the Civil Enforcement Branch for civil enforcement negotiations.

The COB issued 76 Letters of Warning (LOWs) and 247 Notices of Violation (NOVs) in FY 2008. The Branch referred 13 cases to the Civil Enforcement Branch in FY 2008. Most of the Branch’s work was in the wastewater and water quality programs. Some work was in the hazardous waste, solid waste, groundwater, and water resources programs.

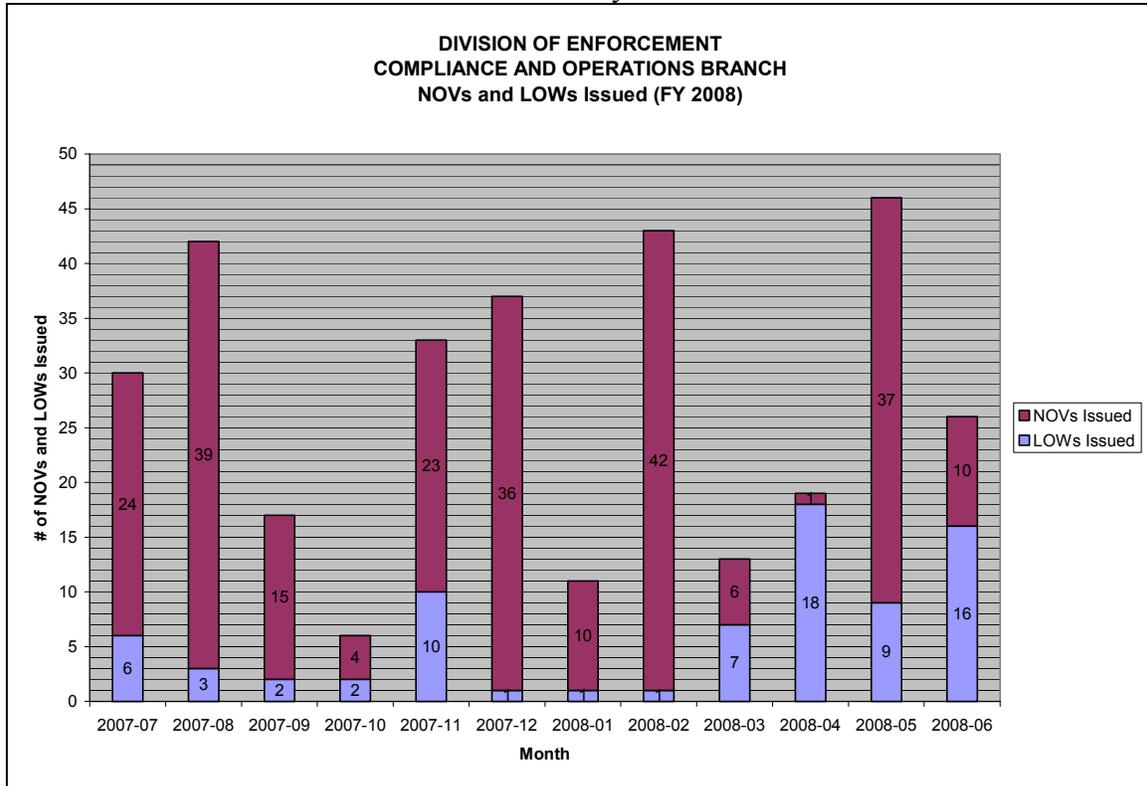
Table 1: Activity counts by program for FY 2008.

COMPLIANCE AND OPERATIONS BRANCH - COMPLIANCE ACTIVITY

PROGRAM	ENFORCEMENT		PERMIT/PROGRAM		CASE REFERRALS
	LOWs	NOVs	LOWs	NOVs	
Air	0	0	0	0	0
Asbestos	0	0	0	0	0
Hazardous Waste	0	0	0	2	1
RCLA	0	0	0	0	0
Solid Waste	0	2	1	0	0
Superfund	0	0	0	0	0
UST	0	0	0	0	0
Drinking Water	0	0	0	0	0
Groundwater	0	0	0	1	0
Wastewater	74	204	0	3	8
Water Quality	0	1	1	31	3
Water Resources	0	0	0	3	1
Environmental Protection	0	0	0	0	0
TOTAL	74	207	2	40	13

COB issued 323 LOWs and NOVs issued in FY 2008. These LOWs and NOVs consisted of 281 “Enforcement” type and 42 “Permit/Program” type. The “Enforcement” type are issued as a result of compliance reviews conducted directly by the Division of Enforcement. The “Permit/Program” type are issued for violations observed by KDEP’s central office programs. “Permit/Program” violations are referred to the Division of Enforcement to be cited. The COB monitors all LOWs and NOVs issued by the branch for a return to compliance.

Chart 6: Number of LOWs and NOVs issued by month.



COB is responsible for preparing the “Quarterly Non-Compliance Report” (QNCR) every quarter (February, May, August, and November) and submitting it to U.S. EPA. COB prepares the Clean Water Act Facilities Watch List Update and submits it to U.S. EPA every quarter. COB had completed these in a timely manner each quarter of FY 2008.

In FY 2008, the COB began receiving referrals from the Department of Natural Resources for wastewater violations reported on Discharge Monitoring Reports by coal operations. These referrals were part of the implementation of the Memorandum of Understanding between DNR and DEP for the administration of the Kentucky Pollutant Discharge Elimination System (KPDES) for coal operations. The COB began training staff in preparation for processing these referrals.

The COB has played a key role in the U.S. EPA State Review Framework (SRF) audit. The SRF was coordinated by COB. COB has also taken the lead in the implementation of several SRF recommendations. Of particular note, COB coordinated the revision of the *Enforcement Management System* for the KPDES program.

In FY 2008, the COB has applied significant effort toward improving the Division’s processes and procedures. All the Division’s administrative procedures were reviewed and

updated. The COB prepared and provided training on the administrative processes to the Division's staff. The COB also worked on improving the Division's use of the Department's TEMPO database. This included revising and standardizing the Division's documents, revising the Work Activity Logs to better report on the progress of enforcement cases, cleaning up old or erroneous data, and training Division staff on the use of TEMPO.

SUMMARY

The Division of Enforcement had an eventful and productive year in FY 2008. The Division was allowed to hire nine environmental enforcement specialists, reversing a 3-year trend of staff reductions. The Division has been working to improve internal processes to improve efficiency and effectiveness. Tremendous effort has been placed improving case management, including the elimination of the "unassigned" case backlog and the more effective management of the high-volume of UST cases. The Division has become more effective at reporting its activities to the program divisions.

The Division has resolved numerous significant cases in FY 2008 and had performed important work in several major initiatives. This includes resolution of the Rockwell case, resolution of the cases with the CSO/SSO communities, reduction of the UST case backlog, and work on the secondary aluminum MACT cases.

The Division looks toward several important goals for the future. The Division plans to implement a new structure that reconfigures the Civil Enforcement Branch into three sections. Included is the hiring of three supervisors to oversee the assigned case load for each of these three sections. The Division also plans to implement reporting mechanisms to better quantify the types of cases that are being worked, and to better quantify the amount of time taken to move case through the enforcement process from assignment to monitoring. The ultimate goal is to provide efficient and effective environmental enforcement for the Department for Environmental Protection and the citizens of the Commonwealth of Kentucky.